Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. _____

PATRICIA H. BOWLES, PETITIONER

v.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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July 25, 1994

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QUESTIONS PRESENTED

1. Whether Petitioner's Constitutionally Protected Property Interest In Continued Employment With The Government Of The District Of Columbia, As Anchored In An Existing Merit Personnel Statute, Can Be Terminated Simply By Passing A Temporary Act That Is Inconsistent With Existing Statutory Merit Personnel Provisions That Guaranteed Petitioner A Property Interest In Continued Employment.

2. Whether It Is Constitutionally Permissible For The Legislature of The District Of Columbia To Pass Surplus Temporary Legislation Wholly or Partly For The Purpose Of Circumventing Petitioner's Constitutional Rights To Due Process And Equal Protection Of The Law.

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OCTOBER TERM, 1994

No. _____

PATRICIA H. BOWLES, Petitioner,

v.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner Patricia H. Bowles respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on April 26, 1994.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia is not reported and appears in the Appendix 1a hereto. The opinion of the United States District Court for the District of Columbia is not reported and appears in Appendix 4a hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on April 26, 1994 and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent parts that "no person shall . . . be deprived of life, liberty, or

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property, without due procewss of law . . . ."

STATEMENT OF THE CASE

Petitioner[1] is a 21 year employee who was terminated from her permanent career status employment with the Government of the District of Columbia under the guise of a modified reduction-in-force on November 15, 1991. This so-called modified reduction-in-force was only applied to an improperly targeted group of non-union employees at grades DS 11 and higher.

A 1991 profile of District of Columbia employees in grade levels DS-11 and above not in collective bargaining unions (the "targeted group") reflected the following:

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[1] Petitioner Bowles was one of four plaintiffs below and is the sole plaintiff to this petition in the Supreme Court.

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a. The average age in targeted group--46.5 years;

b. The average length of service in targeted group--17 years.

In addition to targeting older workers, it was one of the goals of the District of Columbia's modified reduction in force process to "minimize the adverse impact on younger District employees in lower level job series." This was an irrational classification because age and union membership are not directly relevant to legitimate employment decisions by a governmental employer, such as the District of Columbia, which is governed by right to work mandates. (See footnote 1, infra).

At the time of her termination, Petitioner was a 47 year old full-time permanent career status (DS-301-13), non-

union employee of the District of Columbia Department of Human Services. Petitioner has a Masters Degree in Social Work and is a Licensed Independent Social Worker. Her performance evaluations were always excellent or satisfactory. Petitioner was employed as a Supervisory Policy and Procedure Specialist in the D.C. Office of Health Care Financing. This was a federally funded position that did not impact the District's budget.

On May 31, 1991, Petitioner met with her supervisor to discuss her performance evaluation. During that meeting Petitioner's supervisor told her that she wanted Petitioner out of the Department and subsequently indicated that she wanted Petitioner out of the Office of Health Care Financing. Petitioner was also told by her supervisor that she would

be on vacation for about 30 days and Petitioner should seek another job during that time period. Petitioner, believing that her performance evaluation had been wrongfully lowered from "excellent" to "satisfactory", requested that the satisfactory evaluation given to her be withdrawn from her personnel records. However, the evaluation was not discussed further with Petitioner nor was it withdrawn. In an improper attempt to have Petitioner terminated, Petitioner's supervisor signed an optional Form 8 certifying that she had reviewed the position description of Petitioner and that it was accurate as to the major duties and responsibilities performed by Petitioner. The position description stated that part of the duties and responsibilities were to supervise 8-10

persons. However, the certification was not accurate because at the time Petitioner did not supervise 8-10 persons as certified by Petitioner's supervisor. As a direct result of Petitioner's supervisor's wrongdoings during the modified reduction-in-force process, Petitioner was placed on an improper retention register in competitive level 301-13-27-S in which her name was the sole name on the register. Petitioner was qualified to perform the duties described of Policy Analyst in the DS-301-13-08-N competitive level and should have been properly placed on that register. Had Petitioner been given the opportunity to compete for retention with the Policy Analysts as required by law, and had been placed on the correct register for competitive level DS-301-13-08-N, she

would not have been terminated. Petitioner's 21 years of District employment gave her more seniority than the persons listed on the register from which she was excluded, namely, Stephen Havenner, Mildred Harper, Jennifer Ragins Johnson, Margaret Graves, Larry Deneal, Anita Hawkins and Armeta Ross.

As of July 14, 1991, Petitioner's job title was Supervisory Policy & Procedure Specialist and her UPPS number was 0151183. On the mandatory Administrative Order No. 1-91 signed by the Mayor, Sharon Pratt Dixon and the Head of the Agency, Vincent C. Gray, all positions identified as excess were listed and abolished. However, Petitioner's position title was Supervisory Policy and Procedure Specialist and her UPPS number 0151183 did not appear on Administrative Order No. 1-

91. Administrative Order No. 1-91 is the only Administrative Order dealing with the abolishment of excess positions in the Department of Human Services. Although Petitioner's position of Supervisory Policy and Procedure Specialist (UPPS number 0151183) did not appear on the mandatory Adminstrative Order No. 1-91 and her position had not been properly abolished, she was wrongfully terminated under the pretext of a modified reduction-in-force ("RIF") as intended by her supervisor. Petitioner's termination was in violation of all procedures mandated under the modified reduction-in-force act and requlations. Petitioner did not receive the process she was due.

Despite the District's failure to comply with the procedures of both the modified RIF and the procedures of the

expected and settled RIF procedures, on October 9, 1991, Petitioner was improperly informed that her permanent, career status employment with the Government of the District of Columbia would be terminated on November 15, 1991 as a result of the necessary abolishment of excess positions pursuant to D.C. Act 9-65. There was no rational basis nor compelling governmental need for this notice--other than that Petitioner had protested an unfair employment practice of her supervisors in the Spring of 1991. Petitioner was targeted for the modified reduction-in-force because of her protest, her age and her non-union status. Each of the above basis was impermissible for terminating Petitioner's long-term employment with the District of Columbia. There was no adequate process for Petitioner to invoke

her property interest prior to or after her termination.

Respondent Government of the District of Columbia is a municipal corporation and should not be allowed to act inconsistent with the Constitution and laws of the United States and the provisions of the District of Columbia Self-Government and Government Reorganization Act of 1973. At all times relevant hereto, the Government of the District of Columbia operated the D.C. Department of Human Services where Petitioner was employed.

Petitioner's constitutional claims are best understood by studying the language of the various statutes and constitutional provisions involved. The Constitution of the United States provides that: "The Congress shall have Power . . . To exercise exclusive Legislation . . .

over such District . . . as may . . . become the Seat of the Government of the United States . . . ." (U.S. Const.) Art. I, §8, cl. 17. Congress is empowered by the Constitution, to establish the method by which the District of Columbia will be governed. For purposes of this case, it is not necessary to review all of the congressional enactments pertaining to the management of the affairs of the District of Columbia. Nevertheless, to understand the movement of constitutional authority from the Congress to the District of Columbia it is important to note that congressional legislation dealing with the District of Columbia began with "the Act of July 16, 1790, 1 Stat. 130, by which the District was established as the permanent seat of Government of the United States."

It is within the District of Columbia Self-Government and Government Reorganization Act of 1973, however, that this case is particularly concerned. See, D.C. Code § 1-201. There Congress stated its intent "to delegate certain legislative powers to the government of the District of Columbia . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." Id.

In D.C. Code § 1-204, Congress indicated that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the states by

the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1-204.

In D.C. Code § 1-242, Congress vested the executive power of the District of Columbia in the Mayor as chief executive officer. Specifically, the Mayor is responsible for the "proper execution of all laws relating to the District and for the proper administration of the affairs of the District" coming under the Mayor's jurisdiction or control. Id. Moreover, the Mayor is empowered to administer all laws relating to conditions of employment of personnel in executive departments of the District of Columbia. D.C. Code § 1-242 made clear that all actions affecting personnel in such executive departments of the District of Columbia were to be governed by Federal Laws of Congress

relating to conditions of employment until such time as the Council of the District of Columbia had established "a permanent District government merit system." Id.

Congress specifically provided that personnel legislation enacted by Congress relating to separation shall continue to be applicable until such time as the Council shall establish a "District government merit system." The Council was required to enact a merit personnel system for the District government not later than five (5) years after January 2, 1975.

Pursuant to its mandate from Congress, the Council of the District of Columbia Government enacted the Comprehensive Merit Personnel Act of 1978 (CMPA) in March 1979. The Council made specific findings upon its enactment of CMPA. First, the Council found that it

was required by federal legislation to "adopt a comprehensive merit system of personnel management for the government of the District of Columbia before January 2, 1980." D.C. Code § 1-601.1(1). Second, the Council found that federal legislation required the District of Columbia to "guarantee certain benefits to incumbent employees of the District of Columbia" relating to, among other things, separation from employment with the District of Columbia. D.C. Code §1-601.1(2). Third, the Council found that the existing authority for filling positions within the District of Columbia was too fragmented. D.C. Code § 1-601.1(3).

Furthermore, the Council set forth the specific purpose and policy which CMPA was established to address. It provided

that CMPA was intended to insure that the District of Columbia Government had a "modern flexible system of public personnel administration." D.C. Code § 1-601.2(a). Among the purposes which CMPA was designed to accomplish were:

1. The creation of uniform systems for personnel administration. D.C. Code § 1-601.2(2).
2. Insure the efficient administration of the District personnel system. D.C. Code § 1-601.2(4).
3. Establishing the means to recruit, select, develop and maintain an effective and responsive work force consistent with merit principles. D.C. Code § 1-601.2(7).

In fact, CMPA established a Career Service which was mandated to follow merit principles such as:

1. Recruiting, selecting and advancing employees on the basis of their ability, knowledge and skills through an open and competitive process. D.C. Code § 1-601.2(b)(1).

2. Retaining employees on the basis of their performance, correcting inadequate performance and separating employees whose inadequate performance cannot be corrected. D.C. Code § 1-601.2(b)(4).

3. Assuring fair treatment of employees in all aspects of employment without regard to, among other things, political affiliation, race, color, age and etc. D.C. Code § 1-601.2(5). In fact, one of the purposes for the enactment of CMPA was to mandate that a proper regard shall be accorded all constitutionally protected rights of citizens. Id.

In addition, CMPA provided that persons employed by the District of Columbia Government on the date that it became effective would be guaranteed rights and benefits at least equal to those applicable to such persons under provisions of federal personnel law, rules and regulations in force on the date immediately prior to the date that CMPA became effective. D.C. Code § 1-602.4(a).

In the development of the new comprehensive merit personnel system, the Mayor of the District of Columbia was charged with the development of unified systems for all employees of the District of Columbia Government. D.C. Code § 1-602.5. Moreover, each incumbent employee of the District of Columbia Government was expressly guaranteed no reduction in benefits except as provided by the

reduction-in-force provisions subchapter XXV of CMPA. D.C. Code §§ 1-602.5 and 1-625.1.

In the lower courts, Respondent District of Columbia made much ado concerning its "dire financial condition" and "the excessive number of mid-level employees" as the two motivating factors for the current modified reduction-in-force. However, when Respondent Sharon Pratt Kelly was asked to identify all documents, studies, reports or audits which support the finding contained in D.C. Resolution 9-92 declaring the existence of an emergency and the need to reduce the District of Columbia Government work-force, Petitioner received the following response from Appellee Kelly:

> "Response: That resolution was passed by the City Counsel [sic] not the Mayor.

S u p p o r t i n g
information is not in
my possession."

Notwithstanding the above failure to identify the factual support for the assertion of a financial crisis as set forth in D.C. Resolution 9-92, Respondent indicated that both the "dire financial condition" and "excessive mid-level employees are highlighted in the Report of the Commission on Budget and Financial Priorities for the District of Columbia, November, 1990 ("Rivlin Report"). Respondent has acted irrationally by passing new RIF legislation and ignoring important recommendations in the "Rivlin Report". Although the Rivlin Report recommended a staff reduction in the District of Columbia Government, the report recommended a fair and rational approach to such a reduction which was

quite sensitive to equal opportunity and merit personnel objectives as set forth in CMPA. For example, in the summary discussion of its recommendation for a reduction in force the following instructive language appears:

> "Although the staff reductions recommended by the Commission appear large, many of them could be accomplished by attrition and decisions not to fill vacant positions. Contractors could be required or encouraged to hire District employees. Actions affecting current employees would, of course, have to follow existing collective bargaining procedures and personnel regulations. (Emphasis added).

See, Rivlin Report, Summary p. vi. Moreover, in the body of the Rivlin Report, the existing reduction-in-force

regulations were studied by the Rivlin Commission to determine the cost effectiveness of using such regulations for staff reduction in the Government of the District of Columbia. This was a rational based approach to downsizing that was ignored by Respondent. Again, the language of the Commission is instructive in highlighting the willful disregard which the District of Columbia has demonstrated for the rights of Petitioner for continued employment after 21 years with the District. On page 2-19 of the Rivlin Report, the following appears:

> "The District's reduction-in-force (RIF) regulations must be followed when eliminating filled positions. The Commission accounted for these regulations, including the costs of severance pay when calculating savings.

> Many of the positions recommended for elimination are vacant: therefore the District would incur no severance pay for eliminating these positions."

Instead of following the sensible and rational approach recommended by the Rivlin Commission in making its reduction-in-force recommendation, the District enacted new modified reduction-in-force regulations which were discriminatory, unfair, arbitrary and unconstitutional on their face. Contrary to the rational approach of the Rivlin Report, the modified reduction-in-force act and regulations, which are the subject of this action, have no rational basis or compelling governmental purpose. The irrational and arbitrary nature of the modified reduction-in-force process did not treat the older, non-union workers who

occupied the so-called "excess positions" as if they were "real, live employees" who had statutory and constitutional rights which they were bound to respect.[2]

Respondent was not interested in minimizing dislocation of its older, non-union workers. Instead, Respondent was highly interested in "minimizing the adverse impact that the early out retirement would have on younger employees of the District of Columbia." Although this is clear evidence of age discrimination by Respondent, it was ignored by the lower courts. In a RIF setting where preferential treatment is

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[2]In a letter dated June 21, 1991, Otis Troupe the District of Columbia Auditor reported to the Chairman of the Council concerning D.C. downsizing efforts. Mr. Troupe concluded that early out retirement with incentive pay would be the more practical way for "downsizing the government and minimizing dislocation of employees." App. at 171.

given to unionized governmental employees and such a governmental employer has admittedly targeted its older workers, age discrimination combined with discrimination on the basis of union status should be treated as a suspect classification in order to prevent the abuses that occur in cases of this nature.

The District of Columbia principally relies upon the Rivlin Report to support its need to downsize the District of Columbia Government. However, the Rivlin Report made it clear that staff reduction involving current employees had to follow "existing collecting bargaining procedures and personnel regulations." In fact, the Rivlin Report indicated that it had studied the District's reduction-in-force regulations and had accounted for these regulations in calculating anticipated

savings in downsizing the District Government. Therefore, its was clearly erroneous and prejudicial to allow the District of Columbia to rely upon the Rivlin Report to support a need for downsizing the District of Columbia Government, when the Rivlin Report supports an analysis of savings from downsizing under the existing reduction-in-force procedure and not the modified reduction-in-force process.

Since Petitioner's position was fully funded by the Federal Government, there was absolutely no savings to the District of Columbia in supposedly abolishing Petitioner's position and terminating her long term employment. This is because Petitioner's job in maintaining the required State Plan Amendments was not an "excess" function; was not properly

identified or declared "excess" and the District of Columbia is still required to maintain this function based on mandates and funding received from the Federal Government. These facts clearly demonstrate that Petitioner was illegally targeted and wrongfully terminated from her long-term employment with the District during the modified reduction-in-force in 1991.

REASONS FOR GRANTING THE WRIT

1. **Petitioner's Constitutionally Protected Property Interest In Continued Employment With The Government Of The District Of Columbia, As Anchored In An Existing Merit Personnel Statute, Cannot Be Terminated Simply By Passing A Temporary Act That Is Inconsistent With Settled Expectations And Existing Statutory Merit Personnel Provisions That Guaranteed Petitioner A Property Interest In Continued Employment**

The critical issue in this case is whether the D.C. Home Rule Charter and the CMPA, which guaranteed certain benefits to incumbent employees of the District of Columbia at the time of its enactment, gave Petitioner a constitutionally protected property interest in continued employment. Cf. Welbern v. Hunt at 533.

The starting points for determining whether Petitioner has a property interest in continued employment with the Government of the District of Columbia are this Court's decisions in Board of Regents of States Colleges v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972). In Roth, the Supreme Court stated:

> Property interests, of course, are not created by the Constitution.

> Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. 577. See also, Brown v. Georgia Department of Revenue, 881 F.2d 1018, 1024 (11th Cir. 1989).

The Eight Circuit in reliance on this Court's opinion in Sinderman has observed that this property interest may be established by an ordinary contract, or by "the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to

continued employment . . . ." Welburn v. Hunt, 874 F.2d 532, 533 (8th Cir. 1989).

In Roth, the Court further stated:

> To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id. at 577.

The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985), stated:

> " While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such

> an interest, once conferred, without appropriate procedural safeguards."

Accord, Darling v. Kansas Water Office, 774 P.2d 941, 944 (Kan. 1989). In Darling, the court stated:

> States are under no obligation to create property rights in their employees' employment through enactment of civil service legislation. However, once a state has elected to do so, due process rights attach. Id. at 944.

Here, Congress mandated in the D.C. Self-Government Statute that the Council of the District of Columbia was required to establish a merit personnel system within five years of the grant of limited Home Rule to the Government of the District of Columbia. D.C. Code § 1-242(3). In the establishment and

development of the merit personnel system for the District of Columbia, the statute provided that: "Each employee of the District of Columbia government employed on December 31, 1979, shall be guaranteed no reduction of current pay and benefits except as provided in subchapter XXV of this chapter." D.C. Code § 1-602.5. Under the terms of the newly established merit personnel system, § 1-602.5 was a clearly expressed promise of continued employment which gave Petitioner a claim of entitlement to continued employment under the new merit personnel system. Petitioner has relied upon this entitlement to a merit process and she should not have her reliance arbitrarily undermined.

In the area of public employment, the Supreme Court has repeatedly required the

constitutional safeguards provided by due process be applied when there has been a legitimate claim of entitlement to a property interest guaranteed by an expressed or implied promise of continued employment. See, Slochower v. Board of Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952) and Connell v. Higginbotham (1971), 403 U.S. 207, as cited in Roth, 408 U.S. at 576-77. In Wieman, the Supreme Court stated:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 192.

Thus, the cases from the Supreme Court in this area disclose that "the existence of a property interest is a matter of federal constitutional law that depends on an interpretation of state law." Brown v. Georgia Department of Revenue, 881 F.2d at 1025. In Brown the court stated:

> More specifically, as a matter of federal law, a property interest is created whenever a public employee can only be fired for cause." State law determines whether a particular employee is terminable at will or only for cause. An explicit contractual provision or rules or common understandings may determine that issue. [cases omitted]

Id. at 1025.

In the instant case, the CMPA provides for the creation of a Career Service with appointments based on merit principles. D.C. Code § 1-608.1(4). Moreover, CMPA expressly provides that

permanent employees in the Career Service, such as Petitioner, may be disciplined, i.e., suspended, reduced in rank or pay or removed from the Career Service only for cause and only in accordance with cause as defined in D.C. Code § 1-617.1(d).

Clearly, Petitioner as a permanent, career status, pre-1980 employee of the District of Columbia had a property interest in continued employment with the District of Columbia. See, Brown v. Georgia Department of Revenue, 881 F.2d at 1025 ("In this case, since the Merit System Act . . . and the Personnel Board regulations require cause for dismissal, we find that the appellee had a property interest in his job"). Id.

Similarly, since the CMPA and its adverse actions regulations specifically require cause for dismissal of District

employees, such as Petitioner, Petitioner had a property interest in her job entitling her to the protections of due process. See, Ashton v. Civiletti, 613 F.2d 923, 931 (D.C. Cir. 1979) ("Those facts supported a legitimate expectation by appellant that his employment would not be terminated for a reason unrelated to job performance, and that any termination purporting to rest upon such a relationship would be preceded by a due process hearing"). Both courts below have accepted an arbitrary undermining of Petitioner's property rights without requiring the District of Columbia to justify this unlawful violation of Petitioner's rights to due process and continued employment.

PETITIONER AS A PRE-1980 EMPLOYEE OF THE DISTRICT OF COLUMBIA HAD A PROPERTY INTEREST IN THE EXISTING RIF POLICY AND

PROCEDURES WHICH SHE SHOULD NOT HAVE BEEN DEPRIVED OF BASED ON D.C. ACT 9-65

As previously indicated, pre-1980 employees of the District were guaranteed benefits under CMPA that were to be at least equal to the benefits which they had prior to the enactment of CMPA. See, D.C. Code §§ 1-601.1 and 1-602.5. Under existing federal reduction-in-force regulations, Petitioner would have been entitled to the same or similar bump and retreat rights which she enjoyed under the existing merit provisions of CMPA. See 5 C.F.R. Ch. 1 § 351.701.

By its plain language, the modified reduction-in-force process under D.C. Act 9-65 provides for only one round of competition. By depriving Petitioner of her expected second round of competition, Petitioner was deprived of her statutory

guarantee of no reduction in her benefits except pursuant to the reduction-in-force provisions of CMPA. See, D.C. Code § 1-602.5. However, when the District of Columbia conducted a true reduction-in-force in 1993, employees who were terminated under CMPA of 1978 had the required and expected two rounds of competition. The 1993 RIF was of no benefit to Petitioner because her property rights to continued employment had been wrongfully violated with her wrongful termination in 1991 pursuant to the so-called modified reduction-in-force. Clearly, the wrongful termination of Petitioner's employment in 1991 was unconstitutional and the lower courts should have so found. See, Steele v. Louisville and Nashville R. Co., 323 U.S. 192, 202 (1944).

This obvious constitutional violation of Petitioner's property rights justify the grant of certiorari to review the judgment below.

2. It Is Not Constitutionally Permissible For The Legislature of The District Of Columbia To Pass Surplus Temporary Legislation Wholly or Partly For The Purpose Of Circumventing Petitioner's Constitutional Rights To Due Process And Equal Protection Of The Law

In order to properly understand the constitutional wrong committed in this case, it is important to keep three things in mind. First, Petitioner's property rights were anchored in the RIF procedures of CMPA and that CMPA was never repealed or otherwise rendered nugatory during the modified reduction-in-force in 1991. Instead, the RIF procedures in CMPA that Petitioner expected and was entitled to were simply ignored by the Government of

the District of Columbia. No reasons as to why they were ignored was offered by the lower courts. Second, the modified RIF procedures of D.C. Act 9-65 were never followed or applied to declare Petitioner's position excess before she was wrongfully terminated. Petitioner was entitled to the pre-termination procedures set forth in a RIF under CMPA and the modified RIF procedures under D.C. Act 9-65. Petitioner did not receive the pre-termination process under either approach. Instead, Petitioner was arbitrarily terminated and thus deprived of her property interest without competition or a hearing. Finally, the District of Columbia has not and cannot demonstrate that Petitioner's position is excess or that there was any money saved with the termination of Petitioner's 21 year

employment with the District of Columbia.

D.C. ACT 9-65 VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court stated:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process both stemming from our American ideal of fairness, are not mutually exclusive. The equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law; and, therefore we do not imply that the two are always interchangeable phrases. But, as this court has recognized

> discrimination may be so unjustifiable as to be violative of due process.

347 U.S. at 499. See also, Davis v. Passman, 442 U.S. 228, 234 (1979) ("The Fifth Amendment provides that '[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . .' In numerous decisions, this Court 'has held that the Due Process Clause of the Fifth Amendment' forbids the Federal Government to deny equal protection of the laws").

In O'Donnell Construction Company v. District of Columbia, et al., 963 F.2d 420 (D.C. Cir. 1992), the D.C. Circuit applied the equal protection principles of the Fifth Amendment to the U. S. Constitution to invalidate affirmative action legislation passed by the D.C. Council for the benefit of minority business

enterprises. Petitioner maintains that the authority and reasoning of the D.C. Circuit in O'Donnell is equally applicable to the union affirmative action legislation set forth in D.C. Act 9-65.

D.C. Act 9-65 is patently discriminatory on its face by discriminating against older persons, such as Petitioner, who are not part of a collective bargaining unit or who are non-union members. This is especially significant because of the affirmative action of the District of Columbia in prohibiting union membership for persons such as Petitioner. D.C. Act 9-65 exempts members of collective bargaining units from the so-called modified RIF. D.C. Act 9-65 provides:

> Notwithstanding any other provision of law, each agency head is authorized, within

> the agency head's discretion, to identify positions, outside existing collective bargaining units, and at grades 11 and above . . . for abolishment as excess positions."

§ 2(a), D.C. Act 9-65. (App. at 26a).

PETITIONER HAS BEEN DEPRIVED OF HER RIGHT TO WORK WITHOUT DUE PROCESS

The District of Columbia Government is a right to work employer pursuant to D.C. Code § 1-618.1(b)(3). Right-to-work expresses the policy of the D.C. Government to guarantee to each employee of the District Government, the right-to-work without forming, joining or assisting a labor organization and to be protected in the exercise of the right to work without joining a labor organization, association or activity. See also, D.C. Code § 1-618.6. In fact, D.C. Code § 1-

618.4 makes it an unfair labor practice for discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage membership in any labor organization. Id.

There are about 19 states, in addition to, the District of Columbia, which have enacted right-to-work laws, either by statute or by constitutional amendment.[3] A similar provision

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[3]The right-to-work laws in essence provide that employees are not to be required to join union as a condition of receiving or retaining a job. States with such laws are: Alabama - Ala. Code § 25-7-30 (1986); Arizona - Ariz. Rev. Stat. Ann Const. Art. 25 (1984); Arkansas - Ark. Code Ann. Const. Amend. 34, § 1 (Michie 1987); Florida - Fla. Stat. Ann. Const. Art. 1, § 36 (West 1991); Georgia - Ga. Code Ann. § 34-6-21 (Michie 1988); Iowa - Iowa Code Ann. § 731.1 (West 1950); Kansas - Kan. Stat. Ann. § 44.803 (1986); Mississippi - Miss. Code Ann. Const. Art. 7, § 198-A (1972), Miss. Code Ann. § 71-1-47 (1989); Nebraska - Neb. Rev. Stat. § 28-217 (1988); Nevada - Nev. Rev. Stat. Ann. § 613.250 (1992); North Carolina - N.C. Gen. Stat. § 95-78 (1989);

protecting public employees in their right to work without the requirement of union membership is applicable to federal employees. See 5 U.S.C. § 7102. Moreover, the National Labor Relations Act, 29 U.S.C. §§ 157 & 158(a)(3) grants employees the right to work without being required to join or assist a labor organization as a condition of retaining a job. See, Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

While the wording of the states' right-to-work statutes varies from

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North Dakota - N.D. Cent. Code § 34-01-14 (1987); South Carolina - S.C. Code Ann. § 41-7-10 (Law Co-op 1986); South Dakota - S.D. Codified Laws Ann. § 2 (1978); Tennessee - Tenn. Code Ann. § 50-1-201 (1991); Texas - Tex. Rev. Civ. Stat. Ann. § 5207 (West 1987); Utah - Utah Code Ann. § 34-34-2 (1988); Virginia - Va. Code Ann. § 40.1-58 (1990); Wyoming - Wye. Stat. § 27-7-109 (1977); and Louisiana - La. Rev. Stat. Ann. § 981 (1985).

jurisdiction to jurisdiction where they have been enacted, each statute makes it clear that employees are not required to join a union as a condition of retaining their employment job. Some of the state statutes simply bar discrimination on the basis of union membership while others vaguely bar an employment "monopoly" by a labor union or simply bar the requirement of union membership as a condition of employment. Such statutes have been upheld as constitutionally valid by the Supreme Court. See, Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) and Retail Clerks International Association, 375 U.S. 96 (1963). In Lincoln, the Court stated: "Just as we have held that the due process clause enacts no obstacle to block legislative protection of union members,

we now hold that legislative protection can be afforded non-union workers." 335 U.S. at 537.

In Truax v. Raich, 239 U.S. 33, 41 (1915), the Court recognized that: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

While the District of Columbia was not required to provide a right to work provision for its employees, once such a right was provided, it was required to be available to all employees on equal terms. Cf., Darling v. Kansas Water Office, 774 P.2d at 944. See also, Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Here, the legislature for the District of Columbia (the Council and Congress) has terminated Petitioner's employment on the basis of a so-called modified reduction-in-force. The same legislature has exempted members of collective bargaining units from D.C. Act 9-65 for no compelling governmental reason and it has failed to provide evidence to support a rational basis for discriminating against Petitioner by terminating her employment based on lack of union membership.

Congress and the Council, as the legislature for the District of Columbia, owed Petitioner, and all other similarly situated employees of the Government of the District of Columbia, a duty of fair treatment which cannot be violated on the basis of Petitioner's non-union or non-

collective bargaining membership status. D.C. Code §1-601.2(b)(5). See, Radio Officers Union v. NLRB, supra and Steele v. Louisville and Nashville R. Co., 323 U.S. 192, 202 (1944) ("The Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"). In Steele, the Supreme Court further explained:

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

323 U.S. at 202.

Here, the Congress and the Council have disregarded their duty to treat District employees who are members and non-members of collective bargaining units equally. Moreover, Congress and the Council are absolutely silent as to the rational basis or compelling governmental interest for treating non-union member employees of the Government of the District of Columbia in such a discriminatory manner. Unlike the CMPA, D.C. Act 9-65 contains no findings or statement of purpose for the blatant discrimination between members and non-members of collective bargaining units or unions. D.C. Act 9-65 is tantamount to an employment monopoly or affirmative action legislation for unions. Thus, in this affirmative action context, the classification exempting members of

collecting bargaining units from the modified reduction-in-force must be justified by a compelling state purpose. Cf., Wygant v. Jackson Board of Education, 476 U.S. 267, 283 (1986). ("Denial of a future employment opportunity is not as intrusive as loss of an existing job").

In Wygant, the Court was particularly concerned with the burden that a preferential layoff scheme imposed on innocent parties. 476 U.S. at 282. The Court stated:

> Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city

> with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns', worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 58. Layoffs disrupt these settled expectations in a way that general hiring goals do not.

Wygant v. Jackson Board of Education, 476 U.S. at 283. Here a preferential layoff scheme has inflicted adverse financial as well as psychological harm upon Petitioner simply because of her protest, age and non-union status. The District's nefarious modified reduction-in-force scheme has disrupted the settled

expectations and rights that Petitioner valued most from her 21 year employment with the District of Columbia.

Here, there were other less intrusive means of accomplishing the District's need of meeting its so-called financial crisis. CMPA provided for a true reduction-in-force for the orderly furloughing or termination of employees (D.C. Code § 1-625.1) and consideration of job sharing and reduced hours (D.C. Code § 1-625.2(a)(4)). However, D.C. Act 9-65 as applied to Petitioner ignored these less intrusive means of accomplishing the District's asserted purpose of meeting its financial crisis. The means selected by the District are contrary to the recommendation set forth in the Rivlin Report to apply its existing personnel procedures. The District ignored not only

the above recommendation by the Rivlin Commission, but it ignored the less intrusive means contained in its CMPA when it enacted D.C. Act 9-65. There is no satisfactory or legitimate explanation for the District chosing to ignore less intrusive means of accomplishing its stated objective of meeting its financial crisis. It was unfair to impose the entire burden of supposedly balancing its financial books on the back of such a long term, permanent, career employee such as Petitioner. The District's selection of layoffs under its modified reduction-in-force procedures, without the expected bump and retreat rights of its existing reduction-in-force statute and regulations, cannot satisfy the demands of the Due Process and Equal Protection Clauses. See, Wygant v. Jackson Board of

Education, 476 U.S. at 284. See also, Croson v. City of Richmond, 478 U.S. 1016 (1986) and Croson v. City of Richmond, 488 U.S. 469 (1989). Congress and the Council of the District have gone too far in unnecessarily trampling the interests of an exemplary, long term, permanent career employee without making any findings to support their departure from the orderly merit principles and procedures found in CMPA. The modified reduction-in-force as implemented in 1991 was a farce. There is no rational basis for conducting a modified RIF in 1991 that targeted older, non-union workers, such as Petitioner, and then conducting a true RIF in 1993 pursuant to existing settled RIF authority that existed in CMPA. Only this Court can prevent the wrong that the District has

caused by the irrationality in its modified reduction-in-force of 1991.

THE COURT ERRED WHEN IT DID NOT FIND THAT THE RESPONDENT HAS UNLAWFULLY GRANTED NOBILITY STATUS TO MEMBERS OF COLLECTIVE BARGAINING UNITS IN THE DISTRICT OF COLUMBIA

Art. 1 § 9 Cl. 8 provides that no title of nobility shall be granted by the United States. The District of Columbia, as well as the Congress, must afford every person within its jurisdiction the equal protection of the laws. See, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) and Davis v. Passman, 442 U.S. 228, 234 (1979). See also, Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975). In Eskra the court stated:

> From its inception the Federal Government has been directed to treat all its citizens as having been "created equal" in the eyes of the law. Distinctions between

> citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L. Ed. 1774. More than an economic interest is at stake in this case.

Eskra v. Morton, 524 F.2d at 13.

Similarly, distinction between employees based solely on their membership or non-membership in a collective bargaining unit is odious to a free people whose institution are founded upon the doctrine of equality. Thus, the rationale behind the prohibition against the grant of any title of nobility by the United States and any state would appear to prohibit the Congress and the District of Columbia from attaching a badge of

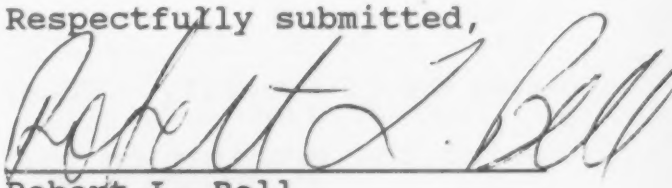
ignobility to employees of the District of Columbia simply because they are not members of collective bargaining units. Cf. Eskra v. Morton, 524, F.2d at 13 n.8.

The obvious constitutional violations set forth herein justify the grant of certiorari to review the judgment of the D. C. Cir. below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,



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PATRICIA BOWLES

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7258 **September Term, 1993**

Viola J. Keyes, et al,

Appellants

v.

District of Columbia, et al.,

Appellees

United States Court of Appeals for the District of Columbia Circuit

FILED APR 26 1994

RON GARVIN
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(91cv02817)

Before: MIKVA, Chief Judge, GINSBURG and RANDOLPH, Circuit Judges

J U D G M E N T

This case was considered on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties and arguments by counsel. The arguments have been accorded full consideration by the court and occasion no need for the published

opinion. *See D.C. Cir. Rule 36(b).* For the reasons stated below, it is

ORDERED and ADJUDGED, by the Court, that the district court decision is affirmed. By passing and ratifying the Emergency Amendment Act of 1991, the D.C. Council and Congress observed all due process in altering any property right appellants may have had in continued employment with the D.C. government. Appellants were also not denied equal protection of the law, as terminating only non-collective bargaining unit members was rationally related to the important goal of reducing the city government's payroll at a minimum cost to taxpayers. Finally, we are barred from considering Ms. Keyes' contract clause claim by Judge Sporkin's finding (which was not appealed) that "nothing in her settlement agreement []

immunized her from a legitimate, non-discriminatory RIF." *Keyes v. District of Columbia*, No. 89-1478, mem. op. at 2-3 (D.D.C. Sept. 15, 1993).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41(a)(1).

Per Curiam
For the Court
/s/ Ron Garvin
Ron Garvin
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

		FILED
VIOLA J. KEYES, ET AL.,	)	SEP 23 1992
	)	Clerk, U.S.
Plaintiffs,	)	District Court
	)	District of Columbia
v.	)	C.A. No. 91-2817
	)	
DISTRICT OF COLUMBIA, ET AL.	)	
	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that defendants' motion to dismiss is granted in part, in that Count Three of plaintiffs' complaint is dismissed; and it is further

ORDERED that a hearing is set for October 1, 1992, at 10:00 am to schedule further proceedings on any remaining counts.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

September 22, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUFUS G. MAYFIELD, ET AL. Plaintiffs, v. SHARON PRATT KELLY, ET AL. Defendants.	FILED SEP 23 1992 Clerk, U.S. District Court District of Columbia C.A. No. 91-2590
CHARLES BRIDGES, ET AL. Plaintiffs, v. DISTRICT OF COLUMBIA, ET AL. Defendants.	C.A. No. 91-2620
VIOLA J. KEYES, ET AL. Plaintiffs, v. DISTRICT OF COLUMBIA, ET AL. Defendants.	C.A. No. 91-2817

MEMORANDUM

Plaintiffs in each of these similar lawsuits are employees who were terminated in the fall of 1991 from District of Columbia government employment by Mayor Sharon Pratt Kelly ("the Mayor"). Their terminations were part of an effort to reduce the bloated District of Columbia budget in order to prevent the city from sinking further into financial crisis. The Court has consolidated these cases for purposes of resolving their Fifth Amendment due process and equal protection claims. These claims are before the Court on defendants' motions to dismiss'[1] and plaintiffs' cross-motions for summary judgment. This Court has jurisdiction under 28 U.S.C. § 1331.

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[1]The Mayfield defendants, 91-2590, filed a motion to dismiss or, in the alternative, for summary judgment.

I. Factual Background

In November 1990, the Commission on Budget and Financial Priorities of the District of Columbia issued a report, known as the "Rivlin Report," which made a number of recommendations on how to remedy the District of Columbia's fiscal crisis. As one of its chief conclusions, the Report called for a reduction in government staffing, especially at middle management levels.

Upon the Mayor's inauguration in January of 1991, she declared a fiscal emergency in the city and announced that the D.C. government would have to undergo a reduction in force ("RIF"). Rather than proceeding under existing RIF guidelines, however, the Mayor and the D.C. Council initiated emergency legislation to override existing provisions for workforce

reductions. The resulting legislation, the District of Columbia Government Comprehensive Merit Personnel Act of 1978 Emergency Amendment Act of 1991, D.C. Act 9-65, 38 D.C. Reg. 4935 ("the Emergency Act"), was approved by the Mayor on July 24, 1991. Congress authorized the enactment of the Emergency Act by passing the District of Columbia Emergency Deficit Reduction Act of 1991, Pub. Law. No. 102-106, 105 Stat. 539 (Aug. 17, 1991).

The Employees affected by this legislation, many of whom are plaintiffs in these lawsuits, were non-union employees at salary grade level DS-11 and above. Approximately one hundred such employees were terminated. Although a much larger number of terminations had been projected, the RIF enacted was less drastic than anticipated. In addition,

some employees who received RIF notices took advantage of early retirement incentives and others were retained or rehired, further reducing the actual number of terminations from the previously projected numbers.

The Emergency Act provided for the abolition of "excess positions." Each agency head was responsible for identifying these positions from among those jobs above the DS-11 level that were not part of existing collective bargaining agreements. Employees terminated under the Emergency Act were not eligible for reassignment and competition under preexisting RIF provisions. The Emergency Act provided instead for one round of competition for retention in a limited range of positions, excluding positions in collective bargaining units.

The plaintiffs in these lawsuits are among the approximately one hundred employees who lost their jobs in the RIF. The Mayfield plaintiffs filed a complaint on October 11, 1991, which included a request for a preliminary injunction enjoining the RIF (No. 91-2590). The Bridges plaintiffs filed a complaint similar to Mayfield in the relief requested, on October 15, 1991 (No. 91-2620. The Keyes plaintiffs filed their complaint on November 1, 1991, also seeking an injunction (No. 91-2817).

Judge (now Chief Judge) Penn, to who these cases were originally assigned, heard arguments on the preliminary injunction request in Mayfield. He denied the preliminary injunction for the reasons stated in his opinion, Mayfield v. Kelly, Mem. Order, No. 91-2590 (Nov. 8, 1991).

Judge Penn found that the plaintiffs had demonstrated neither irreparable injury nor a strong likelihood of success on the merits of their Fifth Amendment claims. Judge Penn expressly limited his conclusions, however, for purposes of the preliminary injunction; he did not decide the merits of the dispute. See Mem. Order, supra, at 22.

These cases are now before the Court on defendants' motions to dismiss and plaintiffs' cross-motions for summary judgment. The Fifth Amendment issues have been fully briefed and the remaining factual disputes are immaterial to the due process and equal protection claims.

II. Due Process

Plaintiffs in each of these cases assert that the RIF violated the Fifth Amendment by denying plaintiffs' rights to

property without due process. In order to establish that defendants have violated their right to due process, plaintiffs must establish first, that they have a property right to their D.C. government employment; and second, that the RIF denied them this right without due process of law.

The Supreme Court has held that where civil servants are guaranteed employment by statute, subject only to the limited exception of for-cause dismissal, such a statute creates a property right protected by the due process clause. In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1982), the Court held that Loudermill, who could only be dismissed for cause under Ohio law, was entitled to due process protection from unfair dismissal. Id. at 538-39. Specifically,

due process required that Loudermill be granted a pre-termination hearing to allow him to challenge the grounds for his dismissal. Id. at 542-43. Like the employee in Loudermill, the plaintiffs here had a statutory right to continued employment unless removed for cause. D.C. Code § 1-617.1(b).[2]

The plaintiffs in these cases are not entitled to the same protection afforded in Loudermill, however, because employees terminated as part of a RIF do not enjoy the same due process protection as

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[2]"A permanent employee in the Career or Educational Service who is not serving a probationary period . . . may be . . . removed from the Service only for cause and only in accordance with the provisions of this subchapter and subchapter VI of this chapter." D.C. Code § 1-617.1(b). Career service includes "all persons appointed to positions in the District government, except persons appointed to positions in the Excepted, Executive or Educational Service." D.C. Code § 1-608.1(a).

employees terminated for cause. This principle follows from the Loudermill decision itself. In evaluating whether the employer's actions violated due process, the Loudermill court balanced "the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens." 470 U.S. at 542-43.

These interests weigh differently in a RIF than they do in a removal for cause. The employee's interest in a for-cause dismissal involves more than the position at stake because of the stigma that results from a for-cause dismissal and the problems such dismissal might create for future employment opportunities. Although a RIF results in significant hardship for

the terminated employees, it does not pose these additional problems. The governmental interests in removing employees during a RIF are also quite different from the usual for-cause dismissal. A RIF involves a large number of employees - in these cases, over one hundred - for whom it is impossible to have pre-termination hearings.

Pre-termination hearings are for these reasons not required in RIF terminations. Neither the RIF regulations that were supplanted by the Emergency Act nor the Emergency Act regulations provide for such hearings. To the extent that courts have discussed this issue, they have concluded that hearings are not necessary during a RIF. See, American Fed'n of Gov't Employees v. Office of Personnel Management, 821 F.2d 761, 767

(D.C. Cir. 1987); West v. Grand County, 967 F.2d 362 (10th Cir. 1992); Prapotnik v. City of St. Louis, 798 F.2d 1168 (8th Cir. 1986), rev'd on other grounds, 485 U.S. 112 (1988). A RIF clearly does not raise the same due process concerns that are raised by for-cause dismissals.

This conclusion is not dispositive, however, of the plaintiffs' due process claims, which are based on a different ground than that which existed in the previously cited cases. The plaintiffs here claim that the RIF that resulted in their terminations violated due process not because of a failure to provide a pre-termination hearing, but because the RIF violated RIF provisions already in force. See, D.C. Code §§ 1-625.1 to 1-625.4. The question this claim presents is whether the Emergency Act violated plaintiffs' due

process rights by overriding these existing RIF provisions.

Plaintiffs assert that their due process rights were violated because the Emergency Act did not afford them the same protections they would have enjoyed under the regular RIF provisions. In particular, plaintiffs challenge the limitation of their rights to competition for reemployment to positions outside of existing collective bargaining units, see D.C. Code § 1-625.4, Temporary Section 2405(d), 38 D.C. Reg. 4935.

The Emergency Act's restriction of plaintiffs' reemployment opportunities does not constitute a violation of the due process clause of the Fifth Amendment. Although the Emergency Act limited existing RIF protections in certain respects, it preserved more than enough

protections to satisfy due process. The Emergency Act provided for one round of retention competition for non-elective bargaining positions; for thirty days written notice; for review of termination by the Temporary Panel of the Office of Employee Appeals; for severance pay, where warranted; and for judicial review of the Temporary Panel's decision on an employee's appeal. Id., § 2405(d)-(h). With the exception of the restriction on competing for collective bargaining positions, these protections are virtually the same as those provided in the supplanted RIF provisions. The Emergency Act's restriction on competition rights and variation of the appeals process do not differ enough from the former RIF provisions to constitute an violation of due process. The Court therefore finds

that the Emergency Act's protections are adequate to withstand plaintiffs' due process challenge. Accordingly, the due process claims asserted in plaintiffs' complaints must be dismissed.

III. Equal Protection

Plaintiffs in Mayfield and Bridges assert that the Emergency Act violated their Fifth Amendment right to equal protection because it arbitrarily targeted a particular group of employees - those employees at grade DS-11 and above who were not part of existing collective bargaining agreements - for dismissal. Because this group is not a suspect class, the legislation must be rationally related to a legitimate end in order to withstand plaintiffs' equal protection challenge. City of Cleberne v. Cleburne Living Cetner, Inc., 473 U.S. 432, 442 (1985).

The Emergency Act survives a rational basis test. The class of employees affected was determined according to facts that are directly relevant to employment decisions. The designation of employees at grade DS-11 and above for consideration for dismissal is a reasonable consequence of findings in the Rivlin Report and by the D.C. Council[3] that the government was overstaffed particularly at middle management levels. The designation of employees not part of existing collective bargaining units is similarly rational, given that collective bargaining agreements conferred specific employment

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[3] See D.C. Council Res. 9-92, § 2(a) (July 2, 1991) ("There exists an immediate crisis regarding the budget of the District of Columbia . . . that, if left unchecked, will severely undermine the District's bond rating and restrict the District's ability to provide essential services and programs to District residents.").

rights on these employees that may have posed greater difficulties in the conduct of the RIF than were presented by a RIF limited to employees outside the bargaining agreements.[4]

The plaintiffs rely on City of Cleburne, supra, in which the Court found that the City's zoning ordinance was not rationally related to the City's stated goals. 473 U.S. at 450. In that case, the zoning ordinance rested on an "irrational prejudice against the mentally retarded" rather than on sound zoning concerns. Id. No such irrational

[4]Defendants in Mayfield assert that dismissing employees in collective bargaining units would have violated the collective bargaining agreements. Motion of Defendants to Dismiss the Complaint or in the Alternative, for summary Judgment, No. 91-2590, at 25. This motion was incorporated by reference in Bridges, Defendants' Motion to Dismiss Compliant, No. 91-2620.

prejudice is present in plaintiffs' case. To the contrary, the reasons for selecting the particular group targeted by the Emergency Act are employment-related, and thus of direct concern to the implementation of a RIF.

Plaintiffs contends that their dismissal penalized them for working their way into middle management positions and therefore punished them for hard work and competence.[5] Plaintiffs' arguments about the Emergency Act's lack of wisdom are not wholly without merit. There is no evidence that the dismissal of this group was the sole method of alleviating the fiscal crisis. Yet the Court does not

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[5]See Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint or In the Alternative for Summary Judgment And Plaintiffs' Cross-Motion for Summary Judgment, No. 91-2590, at 12.

need to determine whether or not the RIF was carried out in the best interests of the city or whether its effectiveness was limited by compromises responsive to the political process. The court need not find that the legislation is intelligent or advisable for purposes of an equal protection challenge. Vance v. Bradley, 440 U.S. 93, 97 (1979) ("[W]e will not overturn such [an unwise or improvident] statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."). See also Gregory v. Ashcroft, 59 U.S.L.W. 4714, 4719-20 (U.S. June 20, 1991) (legislation does not violate equal protection merely because its classifications are

imperfect). The Court need only find that the legislation was rationally related to the legitimate goal of reducing the D.C. government budget in order to uphold the legislation. Because the legislation meets this test, the Court rejects plaintiffs' equal protection challenge. Accordingly, the equal protection claims in the Mayfield and Bridges complaints must be dismissed.

An appropriate order accompanies this Memorandum.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

September 22, 1992.

AN ACT

D.C. ACT 9-65

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

JULY 24, 1991

To amend, on an emergency basis, the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to authorize a modified reduction-in-force procedure and to establish that the provisions of this act are nonseverable.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Government Comprehensive Merit Personnel Act of 1978 Emergency Amendment Act of 1991".

Sec. 2. The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Code §1-601-1 *et seq.*), is amended as follows: Note, Sec 1-625.1

(a) By adding a new section 2405, to read as follows:

"Sec. 2405. Abolishment of Excess Positions.

"(a) Notwithstanding any other provision of law, each agency head is authorized, within the agency head's discretion, to identify positions, outside existing collective bargaining units, and at grades 11 and above of the District Service Schedule or at equivalent levels of other salary or pay schedules, for abolishment as excess positions.

"(b) The Mayor shall make a final determination that a position within the personnel authority of the Mayor is an excess position upon the recommendation of an Executive Review Committee, consisting of the City Administrator, the Deputy Mayor for Financial Management, the Corporation Counsel, the Director of the D.C. Office of Personnel, and the Director of the Office of Labor Relations and Collective Bargaining.

"(c) Notwithstanding any rights or procedures established by any other provision of this title, any District government employee, regardless of date of hire, who encumbers a position determined to be an excess position shall be separated without competition or assignment rights, except as provided in this section.

"(d) An employee affected by the abolishment of an excess position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to 1 round of competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level and shall not include positions in existing collective bargaining units.

"(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

"(f) Neither the determination that a specific position is an excess position nor separation from such a position shall be subject to review except as follows:

"(1) The employee may file a complaint contesting the determination or the separation pursuant to title XV of this act or section 303 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Code §1-2543); and

"(2) The employee may file with the Temporary Panel of the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) of this section were not properly applied.

"(g) A separated employee's entitlement to severance pay shall be determined in accordance with title XI of

this act. The following shall be included in computing creditable service for severance pay for employees separated pursuant to this section: (1) 4 years for an employee who qualifies for veteran's preference under this act, and (2) 3 years for an employee who qualifies for residency preference under this act.

"(h) Separation pursuant to this section shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual.

"(i) The Mayor shall submit a listing of all positions determined to be excess by agency and responsibility center by September 1, 1991, or upon the delivery of termination notices to individual employees.".

(b) By adding a new section 611 to read as follows:

"Sec. 611. Temporary Panel of the Office of Employee Appeals. Note, 1-606.

"(a) There is established a Temporary Panel of the Office of Employee Appeals in addition to, and independent of, the existing Office of Employee Appeals. The Temporary Panel shall have exclusive authority to adjudicate appeals by employees separated pursuant to section

2405, in accordance with existing rules of procedure of the Office of Employee Appeals. The Temporary Panel shall consist of 3 persons appointed by the Mayor with the approval of the Council by resolution which shall take effect immediately upon adoption. The Temporary Panel shall not be subject to sections 601 through 610 of this act (relating to the powers and functions of the Office of Employee Appeals) except to the extent that these sections relate to the adjudication of appeals by the Temporary Panel pursuant to section 2405 of this act.

"(b) Any employee or agency may appeal the decision of the Temporary Panel to the Superior Court of the District of Columbia for a review of the record and such Court may affirm, reverse, remove or modify such decision, or taken any other appropriate action the Court may deem necessary.

"(c) Members of the Temporary Panel shall be paid compensation not to exceed $250 a day.

"(d) The Mayor shall make available to the Temporary Panel from funds appropriated for Governmental Direction and Support such office space, equipment, and staff, including hearing examiners and necessary support staff, as the Temporary Panel shall require."

Sec. 3. At no time shall the total number of positions, outside existing

collective bargaining units, at grades 11 and above on the District Service Schedule and at equivalent levels in other salary or pay schedules, exceed the number of such positions in an agency on July 1, 1991, minus the number of positions abolished by the agency pursuant to this act.

Sec. 4. If any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 Emergency Amendment Act of 1991 or its application to any person or circumstances is held to be unconstitutional, beyond the statutory authority of the Council of the District of Columbia, or otherwise invalid, then all provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978

Emergency Amendment Act of 1991 shall be deemed invalid.

Sec. 5. Effective Date.

(a) This act shall take effect on the later of : (1) its enactment (approval by the Mayor, or in the event of a veto by the Mayor, action by the Council of the District of Columbia to override the veto); and (2) enactment of an amendment to section 422(3) of the Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 790; D.C. Code § 1-242(3)) enabling the District of Columbia to enact the substance of section 2 of this act.

(b) This act shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of

the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 788; D.C. Code § 1-229(a)).

/s/ John S. Wilson
Chairman
Council of the District of Columbia

/s/ Sharon Pratt Dixon
Mayor
District of Columbia

APPROVED: July 24, 1991

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were served by hand-delivery this 25th day of July, 1994 to:

Charles L. Reischel, Deputy
Corporation Counsel
Office of the Corporation
Counsel
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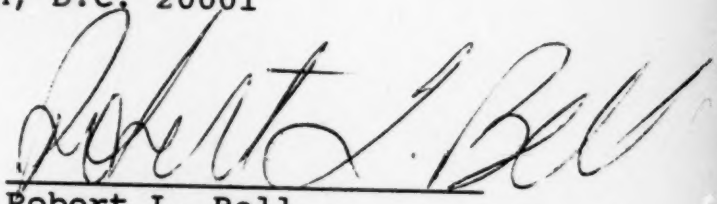

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